No. 22330

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOTEL CONQUISTADOR, INC.
d/b/a HOTEL TROPICANA,
Respondent.

Brief for Respondent

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ARGUMENT

I. The Board's Finding That the Company's Discharge of Employee Frank Yockmen Was Discriminatory and Motivated by His Union Activities, Rather Than by Legitimate Business Reasons, Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

A. THE INSUBSTANTIAL EVIDENCE ON WHICH THE BOARD RELIED IN FINDING AN IMPROPER "MOVING CAUSE" FOR THE DISCHARGE OF YOCKMEN.

The issue before the court in determining whether the Company violated § 8(a)(3) and (1) of the National Laber Relations Act, 29 U.S.C. § 158(a)(3) and (1), is whether substantial evidence on the record as a whole supports the Board's finding that the "moving cause" of employee Frank Yockmen's discharge [*NLRB v. Security Plating Co.*, 356

F.2d 725 (9th Cir. 1966); *NLRB v. Texas Independent Oil Co.,* 232 F.2d 447, 450 (9th Cir. 1956)] was "discrimination to discourage participation in union activities" [*Radio Officers' Union v. NLRB,* 347 U.S. 17, 39-40 (1954)]. See: *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951); *Shattuck Denn Mining Corp. v. NLRB,* 367 F.2d 466, 467 (9th Cir. 1966). And, as recently reaffirmed by this court in *Aeronca Mfg. Co. v. NLRB,* 385 F.2d 724, 727 (9th Cir. 1967):

> "*A fortiori,* if the discharge is *actually* motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause."

The Board, in its brief to this Court and in its Decision and Order adopting the decision of the Trial Examiner, seeks to show that the Company discharged employee Frank Yockmen because of his union activities. In support of this finding the Board relates facts which, particularly when considered on the record as a whole, do not constitute substantial evidence of the unfair labor practice alleged. While the entire transcript of proceedings before the Trial Examiner constitutes the most eloquent argument in support of the Company's position here, it is necessary to comment upon much of the evidence presented at the hearing in order to expose the fallacies and lack of supporting evidence found in the Board's decision and argument.

In the Trial Examiner's decision relating to the alleged discriminatory discharge (R. 48-52),[1] and the Board's brief,

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1. References to the pleadings and the Decision and Order of the Board are designated "R." References to the transcribed portions of the hearing are designated "Tr."

page 7, it is first emphasized that Yockmen was a leader in the Union's organizing campaign in May of 1964, that he was later elected an officer of the Union, and that these facts became known to his employer. The Company did not deny this at the hearing, and does not do so now. It is noteworthy in connection with the alleged "discrimination" which the Board concluded had the effect of "discouraging membership" in the Union (R. 53), that Yockmen himself voluntarily disclosed these facts when he solicited the signature of Philip Daly to a Union authorization card (Tr. 62), and offered the fact that he was an officer in the Union to his immediate supervisor, Harry Farnow (Tr. 84), and to at least two other management personnel (Tr. 86, 89). These completely unsolicited remarks of Yockmen can hardly be said to evidence fear of reprisal on his part, or anti-union animus on the part of the Company.

The Board next seeks to attach a great deal of significance to the fact that, according to the Board, on one occasion paymistress Lucretia Rozelle asked Yockmen "rather sharply" what a Mr. Hanley, business manager for the Union, "had to do with this place." (R. 51; Tr. 90). "The question was asked in apparent criticism of the fact that Hanley had requested the Nevada Industrial Commission to investigate an industrial accident Yockmen had suffered at the Tropicana." (R. 51).

In the first place, the Board's statement that the question was put "rather sharply" is simply without foundation in the record. The entire evidence on this point was the following testimony of Yockmen:

> "Q. [by Mr. Hecht, counsel for the General Counsel] Can you tell us what was said?
>
> A. Well, she said what does Mr. Hanley have to do with this place.

Q. What, if anything, did you say?

A. I said, Why?

Q. What did she say?

A. She said that the Nevada Industrial Commission was coming down to take a report, and investigate my accident report there, the request of Mr. Hanley.

Q. And what, if anything, did you say to that?

A. I said—Well, she said that they had been down here at 10:00 o'clock in the morning and that it was around 9:00 in the morning.

Q. Was there any further conversation?

A. No." (Tr. 90-91).

In its brief, page 5, the Board states that this conversation occurred the day before Yockmen was dismissed, thereby suggesting that the discovery of the Union representative's interest and presence on the scene led immediately to Yockmen's dismissal. This also is simply not true. Yockmen was fired September 1, 1964. The only evidence as to the date of the conversation was provided by Yockmen himself, who said that it occurred on August 13, 1964 (Tr. 90), more than two weeks before the discharge. And the Trial Examiner's decision obviously adopts the August 13 date (R. 51).

Moreover, there is no suggestion that the paymistress knew or had any reason to know that Hanley was a representative of the Union. Considered in this light, and in view of Yockmen's somewhat unintelligible restatement of the paymistress' comments quoted above, her question in context reflects nothing more than idle curiosity. At the most, the conversation reflects the paymistress' concern that an outsider was taking up her time, and infringing upon what she may have felt to be her and the company's exclusive domain.

The Board next relies on what it terms "unlawful interrogation" of Yockmen by supervisor Farnow, not only to buttress its discriminatory discharge finding, but also as the sole basis for finding a separate § 8(a)(1) violation. Again, for the purpose of demonstrating the paucity of evidence offered in support of these charges, the following entire testimony, extracted from a transcript of more than 300 pages, is as follows:

> "Q. [by Mr. Hecht] Will you tell us what was said in the conversation?
>
> A. [by Mr. Yockmen] Well, he [Farnow] pointed to me the petition [for Union recognition] on the wall and he asked me if I knew anything about this.
>
> Q. And what did you say, if anything?
>
> A. I said, 'Yes' that I was a member and officer of the Union.
>
> Q. Did he make any reply to this?
>
> A. No, none whatsoever. He walked out of the casino." (Tr. 84).

The Board, seeking to embellish this meager testimony, notes that at the time of the conversation with Farnow, on about June 1, 1964, the Union was conducting an organizational drive. But the Board fails to note that well before Yockmen's discharge occurred, the Union had requested, and the Regional Director had approved, the withdrawal of its petition (Tr. I, pp. 563-565 in No. 2-RC-5956).

The Board's brief relates that about an hour after Yockmen's conversation with Farnow, Yockmen learned from Daly (whom the Board found to be a supervisor) that Farnow had been "quite disturbed that Yockmen had not revealed to him his union interest and activities prior to the filing of the Union's petition" (Bd. Br. 4). The Board again puts words in its own witness's mouth. The actual testimony of Yockmen was:

> "A. Well, Mr. Farnow had gone home and Phil Daly walked into the slot machine shop, oh, maybe an hour later, and I asked him if Mr. Farnow had said anything to him or if he was hot and Phil replied, 'No, he wasn't hot about anything.'
>
> He was *just a little disturbed* that I didn't mention to him about *this activity* before the petition for election was held." (Emphasis supplied) (Tr. 85).

"[T]his activity" at least arguably referred to the filing of the petition, and not to Yockmen's union activities, and "just a little disturbed" is clearly not "quite disturbed". Moreover, since it was not established at precisely what time in May the copy of the Union's petition was filed in the shop (R. 45), the Trial Examiner was clearly unjustified, after noting that the Farnow-Yockmen conversation took place about June 1, in stating:

> "It is inferred from this that Farnow had knowledge of the filing of the Union's petition for some time prior to his inquiry of Yockmen as to what he knew about the Union's petition." (R. 46-47).

Again, the circumstance is noted by the Board with sinister implications that Farnow approached Yockmen after he found him "alone" in the workshop (Bd. Br. 4; R. 46). But the fact is, as related by Yockmen and other witnesses, that he always or usually worked alone in the shop (Tr. 101, 175-176, 224).

B. THE EVIDENCE ESTABLISHING A PROPER AND REASONABLE "MOVING CAUSE" FOR THE DISCHARGE OF YOCKMEN.

Respondent contends, in light of the above, that the Board has failed to show substantial evidence that Yockmen was discriminatorily fired for Union activities. When considered with the evidence that the Company's "moving cause" for

firing Yockmen was for security and legitimate business purposes, the Board's evidence is less than insubstantial.

The uncontradicted testimony at the hearing established the following facts. Employee Yockmen was the Tropicana's head slot machine mechanic (Tr. 48). His duties included the repair and maintenance of the approximately 180 slot machines in use at the Tropicana (Tr. 49). When a machine broke down, he would often take it to the workshop where he worked alone and unobserved, and had access to approximately $10,000-$11,000 worth of tools and to an uncounted number of coins in the machinery (Tr. 175-176, 99-102, 222-226). He also filled the machines with uncounted coins constituting the "jackpots" (Tr. 224-225).

As might be expected under such circumstances, Farnow testified that Yockmen was in a "position of trust" (Tr. 163), and Daly stated that the single most important employee qualification for getting and retaining a job at the casino "would be honesty, probably . . . [b]ecause you handle a lot of uncounted money." (Tr. 232-233). Indeed, Yockmen himself admitted that he and others were left "on their honor" in handling the uncounted coins (Tr. 102, 307)

> "Q. . . . And you would say, then, that it was important for Mr. Farnow to have confidence in everyone of you?
>
> A. And it was of paramount importance, right." (Tr. 103).

On August 31, 1964, while supervisor Farnow was confined in the Las Vegas Hospital, he was first informed by Daly—on one of Daly's regular visits to the hospital to keep Farnow abreast of Company progress (Tr. 207)—that employee Yockmen had been taking advances on his salary because of substantial gambling losses (Tr. 153-154). Specif-

ically, Farnow was told that Yockmen had been taking an advance on his pay between every pay period for a period of "many months" because he owed "a lot of money" on a gambling debt (Tr. 159, 181-182, 190). According to Daly, Farnow became so upset on hearing this, that "I thought he was going to have a heart attack." (Tr. 236-237), and Farnow immediately directed Daly to return to the hotel and prepare a termination slip for Yockmen, which was done (Tr. 156-160, 210-213, 237). Farnow testified, although he could not specifically recall that it was done in Yockmen's case, that it was his general policy to discuss the subject of advances with all newly-hired employees; and a sign stating "Positively no advance in wages" was posted in a conspicuous place on the door of the paymistress' office (Tr. 163, 200, 229).

Particularly in view of the requirement of strict security standards and the sensitive position occupied by the gambling casinos (Tr. 104), it is not surprising that Farnow therefore considered Yockmen to be a security risk and an undesirable employee (Tr. 164-165). Yockmen himself testified that he obtained two advance checks per month for a period of six or seven months because he incurred a gambling debt of approximately $1,000, and gave an evasive answer when asked whether or not he had been told by the paymistress that he shouldn't be taking advances (Tr. 304-305).

Most of the Board's efforts and argument at the hearing and in its decision and brief are focused in an attempt to discredit the reasons given by the Company for the firing of Yockmen. None bear careful scrutiny.

It is first noted that the reason given for Yockmen's discharge on the termination slip, "reduction in force," was a pretext admitted to by the Company. This is true, since it

was customary to employ this euphemism in such cases, and to give the real reason only when asked (Tr. 157-158, 217, 251-252). Why an employer should not be able to protect itself from the possibility of libel and slander suits, and give an employee every benefit of doubt on his permanent record is not explained or contradicted by the Board.

The Board next points out that the paymistress, the chief auditor and Daly knew of the advances long before Yockmen was terminated, and none of them were ever reprimanded to the knowledge of the witnesses. However, Farnow was the person who fired Yockmen (Tr. 157), and he was not told of the advances until August 31, 1964.

The Board emphasizes that although the advances had been made for a period of time, the Company contended that the acceptances of advances "suddenly rendered him a 'security risk.'" (Bd. Br. 9). This attack fails to appreciate the circumstances presented in the whole record. In the first place, Yockmen stated that the paymistress said "she was doing it for me," implying a favor (Tr. 305). She admitted to Farnow after the discharge that she should have informed him of the advances earlier (Tr. 188). As for Daly, sometime during the first quarter of 1964 he noticed the distinctive advance paycheck in Yockmen's possession and was then told by Yockmen that he had heavy gambling debts and needed the advance money (Tr. 197-198). During the latter part of August, 1964, Daly again noticed an advance check in Yockmen's possession and "asked her [the paymistress] about it," within a few days thereafter (Tr. 201-206). Paymistress Rozelle confirmed the advances and the reason therefor, and within the next two days Daly mentioned the matter to Farnow at the hospital (Tr. 206-208). He had not mentioned the matter to Farnow earlier because he "didn't think it possible" to

obtain advances without Farnow's prior approval (Tr. 207).

What would the Board say if Yockmen had been fired for accepting only one advance? Surely the inference of improper motive would be far stronger in that case than in the present one, where the employee has demonstrated a six-month history of inability to put his financial affairs in order. The Board's reliance upon the fact that other employees gambled and had non-gambling debts (of minor amounts, to be sure) is misplaced for the same reason—none of them were forced to seek continuous advances for a period of many months in order to satisfy those debts. The fact that the advances covered monies already earned, but not yet due, detracts not one whit from the security risk presented by an employee history of six months of financial difficulties caused by uncontrolled gambling. The Trial Examiner's attempted distinction between advances to pay gambling debts, and advances to pay bills unsatisfied because of gambling losses, is without logical merit. And the distinction is of clearly insufficient worth to justify the adverse inference drawn by the Trial Examiner from the Company's failure to call the paymistress as a witness to explain the alleged discrepancy as to what she was told by Yockmen (R. 50-51).

Finally, the Board seeks to belittle the fact that Yockmen had access to uncounted casino money (Bd. Br. 10; R. 10-11). It notes that the money level in the slot machines was checked before and after Yockmen's work, but fails to appreciate that Yockmen testified that no set procedure was required to be followed, and that his voluntary checking system was often not effective since the supervisors usually left him on his honor (Tr. 102, 307). The Board also neglects to mention the $10,000 in tools where Yockmen worked alone

and unobserved, or the jackpot currency handled by Yockmen. Finally, for all its vaunted "expertise", the Board fails to appreciate the simple fact that no employer, however careful his checking procedures may be, would wish to retain an employee who has repeatedly demonstrated his inability to handle debts arising from wagering, particularly when that employee works around a great deal of cash in his employer's establishment.

In this case, the Board believed the testimony of Yockmen and discredited that of the witnesses Farnow, Daly, and Harvey, wherever a conflict appeared, even though the Trial Examiner gained a "strong impression" of "their liking for him [Yockmen] as a person" and "detected . . . a latent distaste for the testimony they were giving against Yockmen." (R. 49). There was no independent evidence of anti-union bias or any other evidence of improper motive in the firing of Yockmen. None of the witnesses knew of advances given to any other employees in violation of the Tropicana's established no-advance policy (Tr. 160, 276-277, 279-280). Almost all of the testimony of the Company's witnesses was elicited by General Counsel under cross-examination, conducted prior to the employer's direct examination pursuant to Fed.R.Civ.Proc. 43(b). And witness Daly, at the request of counsel for the General Counsel, was absent from the hearing room during the testimony of Supervisor Farnow (Tr. 155).

The Board would have us believe that the Company, through the concerted activity of Farnow, Daly, the paymistress, the auditor, and unknown higher-ups, formulated a plan to entice Yockmen into accepting advances to cover his gambling debts; that they then fired him for doing so simply because he was active in the affairs of a Union which by that time had withdrawn its petition for recogni-

tion; and that they subsequently agreed upon a consistent lie to tell at the hearing. In support of this contention, the Board offers only the following concrete evidence: Yockmen was active in the Union; the Company knew it; Yockmen was fired. In the face of the Company's amply documented "moving cause" for his discharge as a security risk, the Board's contention is simply not supported by substantial evidence on the record as a whole, however insurmountable that test may, in the ordinary case, prove to be.

> "It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the Act." *NLRB v. Standard Coil Products Co.,* 224 F.2d 465, 470 (1st Cir.), cert. denied, 350 U.S. 902 (1955).

Nor may the Board substitute its judgment for that of the employer as to what constitutes reasonable grounds for discharge. *NLRB v. Wagner Iron Works,* 220 F.2d 126, 133 (7th Cir. 1955), cert. denied, 350 U.S. 981 (1956); *NLRB v. Ogle Protection Service, Inc.,* 375 F.2d 497, 505 (6th Cir. 1967).

Moreover, the Board's case rests solely on Yockmen's testimony which it has credited. The general rule, of course, is that where the credibility of a witness is in issue, the matter is for the determination of the Trial Examiner and the Board. However, it has been held that when, under circumstances similar to those present in this case, the findings of the Trial Examiner and the Board are based primarily on the uncorroborated testimony of the party who stands to benefit from an award of reinstatement and back pay, such testimony may not constitute substantial evidence. *NLRB v. Ogle Protection Service, Inc.,* 375 F.2d 497, 505-506 (6th Cir. 1967); *NLRB v. Elias Brothers Big Boy, Inc.,* 327 F.2d 421 (6th Cir. 1964).

Finally, it bears noting that "[t]he fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities." *NLRB v. Citizen News Co.,* 134 F.2d 970, 974 (9th Cir. 1943). Accord: *Osceola County Co-op. Cream Assn. v. NLRB,* 251 F.2d 62 (8th Cir. 1958); *NLRB v. Montgomery Ward & Co., Inc.,* 157 F.2d 486 (8th Cir. 1946). See the Board's decisions in: *Gold Merit Packing Co., Inc.,* 142 NLRB 205 (1963); *Mackie-Lovejoy Mfg. Co.,* 103 NLRB 172 (1953); *John S. Barnes Corp.,* 92 NLRB 589 (1950); *Stainless Ware Co. of America,* 87 NLRB 138 (1949); *Dixie Mercerizing Co.,* 86 NLRB 285 (1949). And, as the court said in *NLRB v. McGahey,* 233 F.2d 406, 413 (5th Cir. 1956):

> "With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence toward the unlawful one."

II. The Allegations of the Complaint Charging the Company with Violations of § 8(a)(1) of the Act by Virtue of the Company's Alleged "Unlawful Interrogation" and "Impression of Surveillance" Were Barred by the Limitation Period Provided in § 10(b) of the Act.

Section 10(b) of the National Labor Relations Act provides:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board. . . ." 29 U.S.C. § 160(b).

The Board attempts to justify the late inclusion of the new and separate § 8(a)(1) violations in the complaint by urging that they "related back" to the charge originally filed on September 29, 1964. *NLRB v. Osbrink,* 218 F.2d 341 (9th Cir. 1954), cert. denied, 349 U.S. 928 (1955). In *Osbrink,* the formal charges filed with the Board encompassed "the discharge of and discrimination against employees in violation of § 8(a)(1) and (3) of the Act." 218 F.2d at 345. The court there allowed allegations of threats, promise of benefits and unlawful interrogation to remain in the complaint, because these allegations related to the same acts contained in the original charge. 218 F.2d at 347. And, citing *Cusano v. NLRB,* 190 F.2d 898 (3rd Cir. 1951), this court noted that the Third Circuit allowed a charge to relate back "because the employer would not be prejudiced since he would 'retain pertinent records, interrogate witnesses and, in a general way, prepare his defense' to the unfair labor practices complained of in the charge. [page 903.]" 218 F.2d at 346.

However, in the instant case, the original charge filed with the Board alleged only a violation of § 8(a)(1) and (3) of the Act in that the Company unlawfully discharged Frank Yockmen (R. 3). No allegation was made, as in *Osbrink,* of other discrimination against Yockmen or his fellow employees.

On April 2, 1965, the complaint was issued which alleged, in addition to the unlawful discharge of Yockmen, that the Company "gave an employee the impression that the Respondent was engaging in surveillance of employees' Union activities," naming George Harvey as the offending agent. (R. 5).

It was not until the second day of the hearing, on August 5, 1965, that the General Counsel moved to amend the

complaint to allege a separate and additional violation of § 8(a)(1) in the alleged unlawful interrogation of Yockmen by supervisor Farnow occurring on or about June 1, 1964.

The allegations of the two additional § 8(a)(1) violations are clearly not within the original unlawful termination charge, and gave the employer no reason to "retain pertinent records, interrogate witnesses and, in a general way, prepare his defense". This is not a case in which, as in *Texas Industries, Inc. v. NLRB,* 336 F.2d 128 (5th Cir. 1964), the alleged violations were "collateral unfair labor practices stemming directly from the company's preparation of its defense to be disposed of in the same proceeding." 336 F.2d at 132. And the statement taken from *American Boiler Manufacturers Assn. v. NLRB,* 366 F.2d 815, 821 (8th Cir. 1966), to the effect that "a material issue which has been fairly tried by the parties should be decided by the Board," is inapplicable here. Surely the Board does not contend that the Company, having unsuccessfully objected to the inclusion of the additional § 8(a)(1) allegations, was thereafter precluded from offering evidence in opposition thereto without relinquishing its claim that these charges were time-barred by § 10(b).

Moreover, the facts surrounding the purported "unlawful discharge" and "impression of surveillance" were well-known to the charging party at the time the original charge was filed; as it developed at the hearing, Yockmen was the only employee involved. No excuse is offered by the Board for the delay in raising the surveillance issue, or for the delay in charging the Company with unlawful interrogation until *the second day of the hearing.*

Under the circumstances, the Board should have refused to consider the additional § 8(a)(1) violations at all.

III. Assuming That the Allegations of the Separate and Independent § 8(a)(1) Violations Were Not Time-Barred, the Board's Findings That the Company Engaged in "Unlawful Interrogation" and Gave Employee Yockmen the "Impression of Surveillance" of His Union Activities, Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

A. THE ALLEGED "UNLAWFUL INTERROGATION".

Assuming that the allegation of unlawful interrogation was not time-barred by § 10(b) of the Act, the alleged "interrogation" of Yockmen by Farnow is, as set forth in Argument I, *supra,* clearly insufficient to support the finding of an unfair labor practice. The simple question "[D]o you know anything about this?" addressed to Yockmen concerning the Union petition, is so patently inoffensive and non-coercive that it is difficult to determine how the Board could have concluded that it interfered with, restrained, or coerced Yockmen in the exercise of his protected rights.

No case has been offered by the Board in which even roughly similar statements constituted an unfair labor practice. In *NLRB v. West Coast Casket Co., Inc.,* 205 F.2d 902 (9th Cir. 1953), cited by the Board, the president of respondent company, during the Union's organizational campaign, interrogated employees as to their feelings about the Union and queried them as to why they thought the Union was needed. The employer also announced new economic benefits in the course of these interrogations, and committed numerous other violations of the Act by making threats, announcing benefits and voicing extreme opposition to the Union. And in the Board's remaining cited decision, *NLRB v. Harrah's Club,* 362 F.2d 425 (1966), cert. denied, 386 U.S. 915 (1967), the Board had previously found that the employer and its representatives threatened and questioned various employees during and immediately

after the Union's organizational campaign, and tacitly threatened loss of jobs, positions, and benefits resulting from the Union's success. 150 NLRB 1702 (1965).

In *NLRB v. S & H Grossinger's, Inc.,* 372 F.2d 26, 28 (2nd Cir. 1967), the court noted that evidence of unlawful interrogation was subject to the "fairly severe standards" set forth in *Bourne v. NLRB,* 332 F.2d 47 (2nd Cir. 1964). As stated in *Bourne,* these standards include:

> "(1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individnal employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
>
> (5) Truthfulness of the reply." 332 F.2d at 48.

Not one of these factors can be said to apply here in support of the Board's findings of unlawful interrogation. See, generally: *Filler Products, Inc. v. NLRB,* 376 F.2d 369, 374 (4th Cir. 1967); *NLRB v. Ambrose Distributing Co.,* 358 F.2d 319 (9th Cir. 1966); *NLRB v. Ritchie Mfg. Co.,* 354 F.2d 90, 98-99 (8th Cir. 1965); *NLRB v. Prince Macaroni Mfg. Co.,* 329 F.2d 803, 806 (1st Cir. 1964).

Finally, and significantly, the Board itself has held that no § 8(a)(1) violation may be found where the employee in fact volunteers the fact of his membership and interest in the Union, as did Yocknen in this case. *Southern Athletic Co.,* 157 NLRB 1051, 1060-1061 (1966).

B. THE ALLEGED "IMPRESSSION OF SURVEILLANCE".

The Trial Examiner also found that the Company committed a separate violation of § 8(a)(1) of the Act by giving employee Yockmen the "impression that the Respondent was engaging in surveillance of employees' Union activities" (R. 46). In support of this finding, the Board again relies upon the testimony of Yockmen, who stated that during one of his rounds he stopped to talk to George Harvey, a floorman for the casino (Tr. 271), and said, "I hear there is a list in the pit." (Tr. 87). Harvey purportedly answered, "Yeah, . . . and your name's on there with two stars behind them," to which Yockmen replied:

> "I said—well, I says that I feel pretty bad, and I asked him first, I says, who has the most stars behind their names and I didn't ask him who I meant—I asked what was the most stars behind the names and he said three, so I said that I feel pretty bad and I said I was elected to the executive board and I should have three stars myself, and he laughed and I walked away, went about my rounds." (Tr. 88-89).

In considering the effect of this testimony, it is necessary to note, in the first place, that Harvey admitted having talked to Yockmen, but flatly denied that such a conversation concerning the alleged "list" ever occurred. (Tr. 275-276).

Secondly, Yockmen was allowed to testify, over the Company's objection, that he was referring to a list of nominees and officers of the Union (Tr. 87-88). He also stated that the "stars", or asterisks, indicated "Position, prominence" in the Union (Tr. 87-89). However, there was no evidence that such a list actually existed or was related to the Union activities of the people allegedly named thereon. Hanley, business manager for the Union, testified that he told

Yockmen of the list, but his statement that "I had been informed that they [the Union officers and nominees] are on the black list and going to be discharged," was properly ordered stricken as hearsay (Tr. 121). No evidence was offered as to the source upon which Hanley based the information given to Yockmen; and there was no suggestion that Yockmen obtained his information in any other manner.

Thirdly, assuming that the conversation actually occurred, Harvey's jocular response to Yockmen's comments indicates that he may have simply "gone along with" what he apparently considered to be a joke.

But even assuming (1) that Harvey lied, (2) that such a list actually existed, (3) that the names of Union dignitaries were noted thereon, and (4) that the Company had the list in its possession, still the Board has failed to provide substantial evidence that Yockmen was interfered with, restrained or coerced in the exercise of his rights guaranteed by the Act. It was the Union business manager, not an employer representative, who gave Yockmen any "impression" of surveillance which he may have felt. It was Yockmen who broached the subject of the list to Harvey, not *vice versa*.

All of the cases cited by the Board on the issue of surveillance are properly concerned with instances where an employer sought to intimidate or coerce his employees by deliberately fostering impressions of his concern about, i.e. disapproval of, their Union activities. See cases cited in the Board brief, page 8, n.8. Such is clearly not the situation presented here.

Finally, as with alleged unlawful interrogations, the Board itself has taken the position that where it was commonly known that an employee was a Union supporter and openly engaged in campaigning for the Union, the em-

ployer's statement to the employee that he had heard she was campaigning for the Union therefore did not give the "impression of surveillance" forbidden by § 8(a)(1) of the Act. *Southbay Daily Breeze,* 160 NLRB No. 145, 63 LRRM 1252 (1966). In this case, Yockmen had already voluntarily disclosed his position with the Union and his activities on its behalf to Daly, Farnow and Mr. Jarrett—and his flip comments to Harvey scarcely indicate that Yockmen felt any restraint or coercion whatsoever.

CONCLUSION

Based upon the meager supporting evidence recounted above, the Board has directed the Hotel Conquistador, Inc. d/b/a Hotel Tropicana, and its officers and agents to cease and desist from violating the provisions of the National Labor Relations Act in the broadest possible language. Moreover, the Company is directed to offer Frank Yockmen immediate and full reinstatement, to reimburse him for loss of earnings suffered since the date of his discharge, and to post the usual notices (R. 77-78, 53-54). The Company submits that, in light of the above, the Board was wholly unjustified in finding that the Hotel Tropicana had committed any unfair labor practices whatsoever and that its findings are clearly not supported by substantial evidence on the record considered as a whole. National Labor Relations Act

§ 10(e), 29 U.S.C. § 160(e). It is therefore respectfully contended that the Board's petition for enforcement of its order should be denied in its entirety.

Dated: February 27, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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